

Stephen M. Garcia, State Bar No. 123338
sgarcia@lawgarcia.com
David M. Medby, State Bar No. 227401
dmedby@lawgarcia.com
THE GARCIA LAW FIRM
One World Trade Center, Suite 1950
Long Beach, California 90831
Telephone: (562) 216-5270
Facsimile: (562) 216-5271

Don Howarth, State Bar No. 53783
dhowarth@howarth-smith.com
Suzelle M. Smith, State Bar No. 113992
ssmith@howarth-smith.com
Darcy R. Harris, State Bar No. 200594
dharris@howarth-smith.com
HOWARTH & SMITH
523 West Sixth Street, Suite 728
Los Angeles, California 90014
Telephone: (213) 955-9400
Facsimile: (213) 622-0791

*Counsel for Plaintiff and
Proposed Counsel for the Putative Class*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNIFER BURNHAM,
individually and on behalf of a class
of others similarly situated,

Plaintiff,

vs.

KENDAL FLORAL SUPPLY, LLC,

Defendant.

CASE NO.

COLLECTIVE ACTION

CLASS ACTION

COMPLAINT FOR:

1. VIOLATION OF THE FAIR LABOR STANDARDS ACT (FLSA);
2. VIOLATION OF CAL. WAGE ORDERS NO. 4-2001, NO. 7-2001 & MINIMUM WAGE ORDER AND CAL. LABOR CODE §§ 510, 1182.11, 1194, 1197;
3. VIOLATION OF CALIFORNIA WAGE PAYMENT PROVISIONS, CAL. LABOR CODE §§201, 202, & 203;
4. VIOLATION OF CALIFORNIA RECORD-KEEPING PROVISIONS, CAL. WAGE ORDERS NO. 4-2001 &

NO. 7-2001, CAL. LABOR
CODE §§226, 1174, & 1174.5;
5. VIOLATION OF
CALIFORNIA MEAL AND
REST PERIOD PROVISIONS,
CAL. WAGE ORDERS NO. 4-
2001 & NO. 7-2001, CAL.
LABOR CODE §§ 218.5, 226.7,
& 512;
6. VIOLATION OF
REIMBURSEMENT OF
EXPENSES AND UNLAWFUL
DEDUCTION PROVISIONS,
CAL. WAGE ORDERS NO. 4-
2001 & NO. 7-2001; CAL.
LABOR CODE §§ 221, 223,
400-410, & 2802
7. VIOLATION OF
CALIFORNIA UNFAIR
COMPETITION LAW
("UCL"), CAL. BUS. & PROF.
CODE § 17200 ET SEQ.
8. VIOLATION OF ERISA §
502(A)(3);
9. VIOLATION OF ERISA §
2ET SEQ. AND BREACH OF
FIDUCIARY DUTY
10. PLAN ENFORCEMENT
UNDER ERISA, § 502(a)(1)(B)

DEMAND FOR JURY TRIAL

Plaintiff JENNIFER BURNHAM (hereinafter referred to as "MS. BURNHAM" or "PLAINTIFF"), an individual, on her own behalf and as representative of a putative class of similarly situated parties, complains and alleges as follows:

JURISDICTION AND VENUE

1. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331; Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b); and Section 501 (e)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132(e)(1).

2. This Court also has original jurisdiction over this action under the Class

1 Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1)
2 there are 100 or more members in the proposed class; (2) at least some members of
3 the proposed class have a different citizenship from Defendant; and (3) the claims of
4 the proposed class members exceed \$5,000,000 in the aggregate.

5 3. In addition, this Court has supplemental jurisdiction under 28 U.S.C. §
6 1367 over Plaintiff's California wage and hour law claims, because those claims
7 derive from a common nucleus of operative fact.

8 4. This Court is empowered to issue a declaratory judgment pursuant to 28
9 U.S.C. §§ 2201 and 2202.

10 5. The Central District of California has personal jurisdiction over
11 KENDAL FLORAL SUPPLY, LLC (hereinafter referred to as "DEFENDANT" or
12 "KENDAL") because KENDAL is a limited liability company organized and existing
13 pursuant to the laws of the State of California, is doing business throughout the State
14 of California, including in this District, and because many of the acts complained of
15 and giving rise to the claims alleged occurred in California

16 6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c)
17 because Defendant resides in this District.

18
19 ***SUMMARY OF CLAIMS***
20

21 7. Plaintiff, MS. BURNHAM was employed by KENDAL from January
22 10, 2006 to August 28, 2008. Her duties included operating kiosks for KENDAL at
23 Costco stores that displayed and sold flowers to the public, hiring and supervising
24 other employees, and regularly reporting to the Kendal district manager on a daily
25 and weekly basis. KENDAL directed and controlled the classification of, method of
26 payment to and benefits of MS. BURHAM and other employees. MS. BURNHAM
27 and other employees working at these kiosks and other locations for KENDAL
28 ("KENDAL EMPLOYEE CLASS") were and/or are misclassified by KENDAL as

1 “independent contractors” and thereby improperly treated as exempt from the
2 provisions of federal law governing employees including the FLSA and/or the
3 applicable state wage and hour laws of California, as described below.

4 8. On September 22, 2008, the California Department of Industrial
5 Relations, Division of Labor Standards Enforcement (“CDLR”) began an
6 investigation of KENDAL’s employment practices. Initially, CDLR cited MS.
7 BURNHAM for violations of California labor law; however, those citations have
8 been dismissed because the employer is not MS. BURNHAM but KENDAL. CDLR
9 is pursuing KENDAL for violations because MS. BURHAM and the others she
10 supervises and others similarly situated (“KENDAL EMPLOYEE CLASSES”) are
11 not independent contractors but KENDAL employees. At a meeting on MS.
12 BURNHAM’s Appeal of the citations, , the Deputy Labor Commissioner Angela
13 Aguilar stated that KENDAL appeared to be the employer of MS. BURNHAM and
14 others, and that they were not independent contractors of KENDAL. MS.
15 BURHAM supervised others and classified them for payment and benefits based on
16 the directions and instructions of KENDAL.

17 9. Plaintiff brings this action on behalf of herself and all persons who were,
18 are, or will be employed by KENDAL nationwide to work at flower kiosks at Costco
19 and other locations, in various roles, including but not limited to supervisors, helpers
20 and employees (“KENDAL EMPLOYEE CLASSES”), at any time within the three
21 years prior to the filing of this Complaint through the date of the final disposition of
22 this action (the “Nationwide FLSA Period”), and who were, are, or will be
23 misclassified by KENDAL as “independent contractors” and thereby treated as
24 exempt from requirements for employees under federal law, including minimum
25 wage, benefits and overtime compensation. This group is hereinafter referred to as
26 the “KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs.”

27 10. Plaintiff also brings this action on behalf of all persons who were, are, or
28 will be employed by KENDAL in California in the Class Positions (hereinafter the

1 “KENDAL EMPLOYEE California Class”), at any time within the four years prior
2 to the date of the filing of this Complaint through the date of the final disposition of
3 this action (the “California Class Period”), and who were, are, or will be misclassified
4 as “independent contractors” and thereby treated as exempt from requirements for
5 employees under California law, including but not limited to payment of minimum
6 wage or the amount which other similarly qualified KENDAL employees were being
7 compensated during the time period for similar work; overtime compensation; meal
8 and rest breaks; workers compensation coverage and other benefits including health
9 benefits; itemized wage statements and payroll deductions for taxes and other
10 required withholdings; payment of all amounts owed upon termination; not making
11 unlawful deductions from payments made to Class members; and reimbursement for
12 all necessary and reasonable expenses incurred in connection with the performance of
13 job duties.

14 11. Plaintiff also brings this action on behalf of herself and all persons who
15 were, are, or will be employed by Defendant nationwide in the Class Positions within
16 the six years prior to this action's filing date through the date of the final disposition
17 of this action (“the ERISA Class Period”), who were, are, or will be misclassified as
18 “independent contractors” and who should have been included in and covered by
19 KENDAL’S 401(k) Plan (“the 401(k) Plan”) and other benefit plans that KENDAL
20 provides to its employees (hereinafter the “KENDAL EMPLOYEE ERISA Class”).

21 12. On information and belief, at all relevant times, Defendant has been the
22 plan sponsor of the 401(k) Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C.
23 § 1002(16)(B). On information and belief, Defendant has exercised actual
24 responsibility, authority, and/or control with regard to the crediting of compensation
25 under the 401(k) Plan, thereby making it a fiduciary of that plans within the meaning
26 of ERISA § 3(21), 29 U.S.C. § 1002(21). On information and belief, KENDAL
27 provides its employees other benefits, including but not limited to health coverage
28 and vacation and sick pay (hereinafter “Other ERISA Benefits Plan”), which

1 constitutes an employee welfare benefit plan within the meaning of ERISA § 3(1), 29
2 U.S.C. § 1002(1), and an employee benefit plan within the meaning of ERISA § 3(3),
3 29 U.S.C. § 1002(3).

4 13. On information and belief, Defendant, at all relevant times, has been and
5 continues to be an employer within the meaning of ERISA § 3(5), 29 U.S.C. §
6 1002(5), the administrator of the 401(k) Plan, within the meaning of ERISA §
7 3(16)(A), 29 U.S.C. § 1002(16)(A), the named fiduciary of that plan within the
8 meaning of ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and a fiduciary of that plan
9 within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

10 14. At all relevant times, Plaintiff was an employee of Defendant, within the
11 meaning of ERISA § 3(6), 29 U.S.C. § 1002(6), and on information and belief, was
12 entitled to be a participant in the 401(k) Plan and “Other ERISA Benefits Plan”
13 within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7). KENDAL’S website
14 states: “Our dedication to our employees continues from farm to warehouse. All of
15 the workers employed in the United States have full benefits and a 401K program.”
16 See <http://www.kendalfloral.com/company/workforce.html>.

17 15. Defendant unlawfully classifies Plaintiff, the KENDAL EMPLOYEE
18 Nationwide FLSA Collective Plaintiffs, and the KENDAL EMPLOYEE California
19 Class members as “independent contractors” and thereby treats them as exempt from
20 minimum wage, benefits, and overtime payments required under federal and
21 California Laws and other requirements of California wage and hour law, despite the
22 fact that they are not independent contractors and not exempt from such
23 requirements. Plaintiff, the KENDAL EMPLOYEE Nationwide FLSA Collective
24 Plaintiffs, and the KENDAL EMPLOYEE California Class members worked hours
25 for which they were not paid minimum wage or the amount which other similarly
26 qualified KENDAL employees were being compensated during the time period for
27 similar work, worked overtime hours, as defined by the applicable federal and
28 California laws, and are and have been entitled to lawful compensation for all hours

1 worked, including premium compensation at one and one-half times the regular
2 hourly rate for overtime hours and at twice the regular hourly rate for some overtime
3 hours (“overtime compensation”), as well as benefits. Defendant KENDAL designed
4 a scheme whereby it paid Plaintiff and the KENDAL Employee CLASS members,
5 not based on hours worked but on KENDAL flowers sold, deducting amounts for
6 flowers not sold. This scheme resulted in underpayments to Plaintiff and the
7 KENDAL EMPLOYEE CLASS members. Defendant has willfully refused to pay
8 Plaintiff, KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs, and the
9 KENDAL EMPLOYEE California Class members the required lawful minimum
10 wage, benefits and/or overtime compensation for hours worked and has failed to keep
11 time records as required by law. Further, as to the KENDAL EMPLOYEE
12 California Class, as a result of such misclassification, Defendant has failed to accord
13 Class members the rights and benefits due to employees under California law,
14 including but not limited to (a) properly calculating the Class members’ wages; (b)
15 providing them itemized wage statements; (c) paying them minimum wage and/or
16 that amount which other similarly qualified KENDAL employees were being
17 compensated during the time period for similar work; (d) paying them overtime
18 compensation for hours worked in excess of 8 hours in one day and/or 40 hours in
19 one week; (e) ensuring that they take proper meal and rest breaks or otherwise
20 crediting them for breaks not taken; (f) deducting proper tax and other amounts
21 legally required to be withheld from their pay; (g) providing workers’ compensation
22 coverage and other benefits such as health benefits; (h) paying all amounts owed
23 upon termination; (i) not making unlawful deductions from payments made to Class
24 members; and (j) reimbursing KENDAL EMPLOYEE California Class members for
25 all necessary and reasonable expenses incurred by them in connection with the
26 performance of their job duties, all as required by applicable California laws, wage
27 orders and regulations.

28 16. Defendant has failed to include Plaintiff and the ERISA Class in the

1 401(k) Plan and the Other ERISA Benefits Plan that KENDAL employees are
2 entitled to participate in. Defendant has failed to comply with ERISA's requirement
3 that they maintain records sufficient to determine benefits due or which may become
4 due under the 401(k) Plan and/or the Other ERISA Benefits Plan, as required under
5 ERISA § 209, 29 U.S.C. § 1059.

6 17. Defendant has failed to keep proper records of Plaintiff's and the ERISA
7 Class's work, including overtime work. Defendant has failed to comply with ERISA's
8 requirement that they maintain records sufficient to determine benefits due or which
9 may become due under the 401(k) Plan or the Other ERISA Benefits Plan,, as
10 required under ERISA § 209, 29 U.S.C. § 1059.

11 18. Defendant has failed to credit Plaintiff and the ERISA Class for work,
12 including overtime work, as Compensation under the 401(k) Plan. Defendant has
13 violated ERISA's fiduciary requirement, set forth in ERISA § 404, 29 U.S.C. § 1104.

14 19. Defendant's practices violate the FLSA, ERISA, and the California laws
15 pled herein. Plaintiff seeks injunctive and declaratory relief, compensation at no less
16 than the minimum wage and/or that which other similarly qualified KENDAL
17 employees were being compensated over the time period, overtime compensation for
18 all overtime work required, suffered, or permitted by KENDAL, damages for the
19 value of exclusion from the 401(k) plan and other employee benefits such as health
20 insurance, damages for making unlawful deductions from payments made to Class
21 members and/or failing to reimburse them for all necessary and reasonable expenses
22 incurred in connection with the performance of their job duties, liquidated and/or
23 other damages and penalties as permitted by applicable law, interest, and attorneys'
24 fees and costs.

25
26 ***THE PARTIES***
27

28 20. Plaintiff MS. BURNHAM is an individual who, at all times relevant

1 hereto, was domiciled in the State of California and resided in the County of Fresno,
2 and therefore was a citizen of the State of California. MS. BURNHAM was
3 employed by KENDAL in Fresno and Clovis, California, from January 10, 2006 to
4 August 28, 2008. MS. BURNHAM worked for KENDAL in a Class Position during
5 the FLSA Class Period, the ERISA Class Period, and the California Class Period.
6 MS. BURNHAM worked hours in excess of forty hours per week and in excess of
7 eight hours per day, without receiving proper payments for hours worked, including
8 times when she did not receive the lawful minimum wage or that amount which other
9 similarly qualified KENDAL employees were being compensated during the time
10 period for similar work, benefits and/or overtime compensation for hours worked, as
11 required by both California and federal law. MS. BURNHAM did not receive
12 itemized wage statements and KENDAL failed to deduct proper tax and other
13 amounts legally required to be withheld from her pay. MS. BURNHAM was not
14 provided workers' compensation coverage or other benefits such as health benefits as
15 required by California law. Ms. Burnham was not included in and not covered by the
16 401(k) Plan or the Other ERISA Benefits Plan which she was entitled to participate
17 in as an employee of KENDAL. KENDAL did not ensure that MS. BURNHAM
18 received proper meal and rest breaks or otherwise credit her for meal and rest breaks
19 not taken. KENDAL failed to pay all amounts owing MS. BURNHAM upon
20 termination. KENDAL made unlawful deductions from payments made to MS.
21 BURNHAM, including for flowers not sold, and failed to reimburse her for all
22 necessary and reasonable expenses incurred by her in connection with the
23 performance of her job duties, all as required by applicable California laws, wage
24 orders and regulations.

25 21. Plaintiff consents to sue for violations of the FLSA, pursuant to 29
26 U.S.C. §216(b) and 256.

27 22. Defendant KENDAL FLORAL SUPPLY, LLC ("KENDAL") is a
28 limited liability company organized and existing pursuant to the laws of the State of

1 California with its headquarters and principal place of business in Carlsbad, in the
2 County of San Diego, and therefore KENDAL is a citizen of California. KENDAL
3 and regularly and systematically injects itself into the commerce stream and does
4 business throughout the State of California, including in San Diego, Santa Cruz, Los
5 Angeles, and Fresno Counties. KENDAL is a grower, supplier and distributor of
6 fresh cut flowers and manufactured bouquets throughout the United States including
7 California, Arizona, Utah, Nevada, Colorado, Idaho, Oregon, and Washington, as
8 well as Canada. The practices described herein were performed by KENDAL in
9 this district and throughout the United States.

10 11 *COLLECTIVE ACTION ALLEGATIONS*

12
13 23. Plaintiff brings the First Claim for Relief for violation of the FLSA as a
14 collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on
15 behalf of all KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs.

16 24. Plaintiff and KENDAL EMPLOYEE Nationwide FLSA Collective
17 Plaintiffs are similarly situated in that they have substantially similar job
18 requirements and pay provisions, and are subject to Defendant KENDAL's common
19 practice, policy, or plan of unlawfully characterizing KENDAL EMPLOYEE
20 Nationwide FLSA Collective Plaintiffs as "independent contractors" and thereby
21 failing and refusing to pay them minimum wage, overtime and other benefits in
22 violation of the FLSA.

23 25. The First Claim for Relief for violations of the FLSA may be brought
24 and maintained as an "opt-in" collective action pursuant to § 16(b) of FLSA, 29
25 U.S.C. § 216(b), since the claims of the Plaintiff are similar to the claims of the
26 members of the KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs.

27 26. The names and addresses of the KENDAL EMPLOYEE Nationwide
28 FLSA Collective Plaintiffs are available from KENDAL'S records. Notice should be

1 provided to the KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs via
2 both first class mail and posting in the offices where they have worked as soon as
3 possible.

4
5 ***CALIFORNIA CLASS ACTION ALLEGATIONS***
6

7 27. Plaintiff brings the Second, Third, Fourth, Fifth, Sixth and Seventh
8 Claims for Relief for violation of California's wage and hour and unfair competition
9 laws as a class action, pursuant to Fed. R. Civ. P.23 (a), (b)(2), and (b)(3), on behalf
10 of all KENDAL EMPLOYEE California Class members, defined in paragraph 10.

11 28. The KENDAL EMPLOYEE California Class is so numerous that
12 joinder of all members is impracticable. Plaintiff is informed and believes, and on
13 that basis alleges, that during the California Class Period Defendant KENDAL has
14 employed at least one hundred persons who satisfy the definition of the KENDAL
15 EMPLOYEE California Class.

16 29. Common questions of law and fact exist as to members of the KENDAL
17 EMPLOYEE California Class, including, but not limited to, the following:

18 a. Whether Defendant improperly misclassified Class members as
19 "independent contractors" rather than employees, in violation of Labor Code ¶
20 2750.5, and consequently denied them certain rights and benefits of employment
21 status.

22 b. Whether Defendant unlawfully failed to pay minimum wage or the
23 amount which other similarly qualified KENDAL employees were being
24 compensated during the time period for similar work, and/or overtime compensation,
25 including overtime premium pay for hours worked in excess of 8 in a day and/or 40
26 in a week, in violation of the California Unfair Competition Law, Cal. Bus. & Prof.
27 Code § 17200 et seq., and the California Labor Code and related regulations, Cal.
28 Labor Code §§201, 202, 203, 226, 510, 1174, 1174.5, 1194, Cal. Wage Orders No. 4-

1 2001, No. 7-2001 and California Minimum Wage Order.

2 c. Whether Defendant deprived Class members of wage compensation as
3 required by Labor Code ¶ 226.7 and 8 California Code of Regulations § 11090, in the
4 amount of one hour of pay for each day on which a Class member did not take a meal
5 break within the time required by applicable Wage Orders and Code of California
6 Regulations.

7 d. Whether Defendant deprived Class members of wage compensation as
8 required by Labor Code ¶ 226.7 and 8 California Code of Regulations § 11090, in the
9 amount of one hour of pay for each day on which a Class member did not take a rest
10 break within the time required by applicable Wage Orders and Code of California
11 Regulations.

12 e. Whether Defendant unlawfully failed to keep and furnish Class
13 members with itemized wage statements and records of hours worked, in violation of
14 Labor Code §§ 226 and 1174;

15 f. Whether Defendant deprived Class members of wage compensation by
16 making unlawful deductions from payments made to Class members, including for
17 flowers not sold, and/or failing to reimburse them for all necessary and reasonable
18 expenses incurred in connection with the performance of their job duties, in violation
19 of Labor Code §§ 221, 223, 400-410, and 2802.

20 g. Whether Defendant deprived Class members of wage compensation as
21 required by Labor Code § 203 by failing to pay all wages due upon separation or
22 termination of employment.

23 h. Whether Defendant deprived Class members of workers' compensation
24 coverage as required by Labor Code § 3700.

25 i. Whether Defendant deprived Class members of benefits including health
26 benefits that Defendant provided other employees.

27 j. Whether KENDAL'S policy and practice of misclassifying the Class
28 members as "independent contractors" and failing to provide the rights and benefits

1 due to employees constitutes an unlawful, unfair and/or fraudulent business practice
2 under California Business & Professions Code § 17200 et seq.

3 k. The proper measure of damages sustained and the proper measure of
4 restitution recoverable by members of the KENDAL EMPLOYEE California Class.

5 30. Plaintiff's claims are typical of the KENDAL EMPLOYEE California
6 Class members' claims. Plaintiff, like other KENDAL EMPLOYEE California Class
7 members, was subjected to KENDAL'S policy and practice of refusing to pay
8 minimum wage or the amount which other similarly qualified KENDAL employees
9 were being compensated during the time period for similar work, pay overtime
10 compensation, provide itemized wage statements, provide workers' compensation
11 coverage, provide meal and rest breaks, properly calculate compensation, deduct
12 proper tax and other amounts legally required to be withheld from pay, pay all
13 amounts owed upon termination and/or reimburse KENDAL EMPLOYEE California
14 Class members for all necessary and reasonable expenses incurred by them in
15 connection with the performance of their job duties, in violation of California law.
16 Plaintiff's job duties were typical of those of other KENDAL EMPLOYEE California
17 Class members.

18 31. Plaintiff will fairly and adequately represent and protect the interests of
19 the KENDAL EMPLOYEE California Class. Plaintiff has retained counsel
20 competent and experienced in complex class actions, the FLSA and state labor and
21 employment litigation.

22 32. Class certification of the Second, Third, Fourth, Fifth, and Sixth Claims
23 for Relief is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because KENDAL has
24 acted or refused to act on grounds generally applicable to the KENDAL EMPLOYEE
25 California Class, making appropriate declaratory and injunctive relief with respect to
26 Plaintiff and the KENDAL EMPLOYEE California Class members as a whole.
27 Plaintiff and the KENDAL EMPLOYEE California Class members are entitled to
28 injunctive relief to end KENDAL'S common and uniform practice of failing to pay

1 minimum wage or the amount which other similarly qualified KENDAL employees
2 were being compensated during the time period for similar work, pay overtime
3 compensation, provide itemized wage statements, provide workers' compensation
4 coverage, provide meal and rest breaks, properly calculate compensation, deduct
5 proper tax and other amounts legally required to be withheld from pay, pay all
6 amounts owed upon termination and/or reimburse Class members for all necessary
7 and reasonable expenses incurred by them in connection with the performance of
8 their job duties,

9 33. Class certification of the Second, Third, Fourth, Fifth, and Sixth Claims
10 for Relief is also appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law
11 and fact common to the KENDAL EMPLOYEE California Class predominate over
12 any questions affecting only individual members of the KENDAL EMPLOYEE
13 California Class, and because a class action is superior to other available methods for
14 the fair and efficient adjudication of this litigation. KENDAL'S common and
15 uniform policies and practices unlawfully treat members of the KENDAL
16 EMPLOYEE California Class as "independent contractors" when they are employees
17 entitled to minimum wage or the amount which other similarly qualified KENDAL
18 employees were being compensated during the time period for similar work, overtime
19 compensation, itemized wage statements, workers' compensation coverage and other
20 benefits including health benefits, meal and rest breaks, itemized wage statements
21 and deductions for proper tax and other amounts legally required to be withheld from
22 pay, payment of all amounts owed upon termination, reimbursement for all
23 necessary and reasonable expenses incurred in connection with performance of their
24 job duties, and other rights and benefits accorded employees under California law.
25 The damages suffered by individual KENDAL EMPLOYEE California Class
26 members are small compared to the expense and burden of individual prosecution of
27 this litigation. In addition, class certification is superior because it will obviate the
28 need for unduly duplicative litigation that might result in inconsistent judgments

1 about KENDAL'S practices.

2 34. Plaintiff intends to send notice to all members of the KENDAL
3 EMPLOYEE California Class as required by Fed. R. Civ. P. 23.

4
5 ***ERISA CLASS ACTION ALLEGATIONS***
6

7 35. Plaintiff brings the Seventh and Eighth Claims for Relief for violation of
8 ERISA as a class action, pursuant to Fed. R. Civ. P.23 (a), (b)(1), and/or (b)(2), on
9 behalf of all ERISA Class members, as defined in paragraph 11.

10 36. The ERISA Class is so numerous that joinder of all members is
11 impracticable. Plaintiff is informed and believes, that during the ERISA Class Period,
12 Defendant employed over 100 persons who satisfy the definition of the ERISA Class.

13 37. Questions of law and fact common to the ERISA Class as a whole
14 include, but are not limited to, the following:

15 a. Whether Defendant failed and continues to fail to maintain accurate
16 records of actual time worked and wages earned by Plaintiff and the ERISA Class;

17 b. Whether Defendant failed and continues to fail to provide accurate wage
18 statements itemizing all actual time worked and wages earned by Plaintiff and the
19 ERISA Class;

20 c. Whether Defendant has violated and continues to violate ERISA §
21 209(a)(1), 29 U.S.C. § 1059(a)(1), as alleged herein;

22 d. Whether Defendant failed to include Plaintiff and the ERISA Class as
23 participants in and provide coverage under the 401(k) Plan and the Other ERISA
24 Benefits Plan to which they were entitled;

25 e. Whether Defendant credited Plaintiff and the ERISA Class with all
26 Compensation which they were paid or entitled to be paid for purposes of the 401(k)
27 Plan, as required by ERISA;

28 f. Whether Defendant violated ERISA's fiduciary standards by its failure

1 to credit Plaintiff and the ERISA Class with all Compensation which they were paid
2 or entitled to be paid for purposes of the 401(k) Plan, as required by ERISA; and

3 38. Plaintiff's claims are typical of those of the ERISA Class. Plaintiff, like
4 all other ERISA Class members, was subject to Defendant's policies and practices of
5 failing to include ERISA Class members in the 401(k) Plan and the Other ERISA
6 Benefits Plan, and Defendant's policy and practice of failing to record time worked
7 and credit compensation, including overtime compensation, earned or owing as
8 Compensation under the 401(k) Plan.

9 39. Plaintiff will fairly and adequately represent and protect the interests of
10 the ERISA Class. Plaintiff has retained counsel competent and experienced in
11 complex class actions and ERISA.

12 40. Class certification of the Seventh and Eighth Claims for Relief is
13 appropriate pursuant to Fed. R. Civ. P. 23(b)(1) because adjudications with respect to
14 individual members of the class would, as a practical matter, be dispositive of the
15 interests of the other members and/or pursuant to Fed. R. Civ. P. 23(b)(2) because
16 Defendant acted or refused to act on grounds generally applicable to the ERISA
17 Class, making appropriate declaratory and injunctive relief with respect to the
18 Plaintiff and the ERISA Class as a whole.

19 41. Plaintiff intends to send notice to all members of the ERISA Class to the
20 extent required by Rule 23.

21 22 **FIRST CLAIM FOR RELIEF**

23 *(Fair Labor Standards Act, Brought by Plaintiff on Behalf of Herself and the*
24 *KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs)*

25
26 42. Plaintiff, on behalf of herself and all KENDAL EMPLOYEE
27 Nationwide FLSA Collective Plaintiffs, re-alleges and incorporates by reference
28 paragraphs 1 through 41 as if they were set forth again herein.

1 43. At all relevant times, KENDAL has been, and continues to be, an
2 “employer” engaged in interstate “commerce” and/or in the production of “goods” for
3 “commerce,” within the meaning of the FLSA, 29 U.S.C. § 203. At all relevant times,
4 KENDAL has employed, and continues to employ, “employee[s],” including
5 Plaintiff, and each of the collective KENDAL EMPLOYEE Nationwide FLSA
6 Collective Plaintiffs. At all relevant times, KENDAL has had gross operating
7 revenues in excess of \$500,000.

8 44. Attached hereto as Exhibit 1 is the Consent to Sue form signed by
9 Plaintiff in this action pursuant to § 16(b) of the FLSA, 29 U.S.C. §§ 216(b) and 256.
10 It is likely that other similarly situated individuals will sign consent forms and join as
11 plaintiffs on this claim in the future.

12 45. The FLSA requires each covered employer, including Defendant
13 KENDAL, to compensate all non-exempt employees at the minimum wage for all
14 hours worked, and at a rate of not less than one and one-half times the regular rate of
15 pay for work performed in excess of forty hours in a workweek.

16 46. The KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs are
17 entitled to be paid at the minimum wage for all hours worked, and are entitled to
18 overtime compensation for all overtime hours worked.

19 47. At all relevant times, KENDAL, pursuant to its policies and practices,
20 failed and refused to pay minimum wage to the KENDAL EMPLOYEE Nationwide
21 FLSA Collective Plaintiffs for all hours worked, and failed to pay overtime premiums
22 to the KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs for their hours
23 worked in excess of forty hours per week.

24 48. By failing to compensate Plaintiff and the KENDAL EMPLOYEE
25 Nationwide FLSA Collective Plaintiffs at the minimum wage for all hours work and
26 for failing to compensate Plaintiff and the KENDAL EMPLOYEE Nationwide FLSA
27 Collective Plaintiffs at a rate not less than one and one-half times the regular rate of
28 pay for work performed in excess of forty hours in a workweek, KENDAL has

1 violated, and continues to violate, the FLSA, 29 U.S.C. § 201 et seq., including 29
2 U.S.C. §§ 206, 207(a)(1) and § 215(a).

3 49. By failing to record, report, and/or preserve records of hours worked by
4 Plaintiff and the KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs,
5 KENDAL has failed to make, keep, and preserve records with respect to each of its
6 employees sufficient to determine their wages, hours, and other conditions and
7 practice of employment, in violation of the FLSA, 29 U.S.C. § 201 et seq., including
8 29 U.S.C. § 211(c) and § 215(a).

9 50. The foregoing conduct, as alleged, constitutes a willful violation of the
10 FLSA within the meaning of 29 U.S.C. § 255(a).

11 51. Plaintiff, on behalf of herself and the KENDAL EMPLOYEE
12 Nationwide FLSA Collective Plaintiffs, seeks recovery of attorneys' fees and costs of
13 action to be paid by KENDAL, as provided by the FLSA, 29 U.S.C. § 216(b).

14 52. Plaintiff, on behalf of herself and KENDAL EMPLOYEE Nationwide
15 FLSA Collective Plaintiffs, seeks damages in the amount of their respective unpaid
16 overtime compensation, liquidated damages as provided by the FLSA, 29 U.S.C. §
17 216(b), interest, and such other legal and equitable relief as the Court deems just and
18 proper.

19 20 SECOND CLAIM FOR RELIEF

21 *(Cal. Wage Orders No. 4-2001, No. 7-2001 & California Minimum Wage*
22 *Order; Cal. Labor Code §§ 510, 1182.11, 1194, 1197 Brought by Plaintiff on*
23 *Behalf of Herself and the KENDAL EMPLOYEE California Class)*

24
25 53. Plaintiff, on behalf of herself and all members of the KENDAL
26 EMPLOYEE California Class, re-alleges and incorporates by reference paragraphs 1
27 through 52 as if they were set forth again herein.

28 54. California law requires an employer, such as Defendant, to pay its

1 employees minimum wage or the amount which other similarly qualified employees
2 are being compensated during the time period for similar work, for all hours worked,
3 and to pay overtime compensation to all non-exempt employees for all hours worked
4 over forty per week, or over eight per day.

5 55. Plaintiff and the KENDAL EMPLOYEE California Class members are
6 non-exempt employees entitled to be paid minimum wage or the amount which other
7 similarly qualified employees are being compensated during the time period for
8 similar work, for all hours worked, and to be paid overtime compensation for all
9 overtime hours worked.

10 56. Throughout the California Class Period, and continuing through the
11 present, Plaintiff and the KENDAL EMPLOYEE California Class members worked
12 in excess of eight hours in a workday and/or forty hours in a workweek. Plaintiff and
13 certain KENDAL EMPLOYEE California Class members also worked in excess of
14 twelve hours in a workday.

15 57. During the California Class Period, Defendant misclassified Plaintiff
16 and the KENDAL EMPLOYEE California Class members as "independent
17 contractors" and thereby exempt from requirements to pay minimum wage or the
18 amount which other similarly qualified employees are being compensated during the
19 time period for similar work, for all hours worked, and to pay overtime
20 compensation, and Defendant failed and refused to pay them at the proper rates for
21 their hours worked.

22 58. As a direct and proximate result of Defendant's unlawful conduct, as set
23 forth herein, Plaintiff and the KENDAL EMPLOYEE California Class members
24 have sustained damages, including loss of earnings for hours worked on behalf of
25 Defendant in an amount to be established at trial, prejudgment interest, and costs and
26 attorneys' fees, pursuant to statute and other applicable law.

27 ///

28 ///

THIRD CLAIM FOR RELIEF

*(California Wage Payment Provisions, Cal. Labor Code §§201, 202, & 203,
Brought by Plaintiff on Behalf of Herself and the KENDAL EMPLOYEE
California Class)*

59. Plaintiff, on behalf of herself and all members of the KENDAL EMPLOYEE California Class, re-alleges and incorporates by reference paragraphs 1 through 58 as if they were set forth again herein.

60. California Labor Code §§ 201 and 202 require Defendant to pay its employees all wages due within the time specified by law. California Labor Code § 203 provides that if an employer willfully fails to timely pay such wages, the employer must continue to pay the subject employees' wages until the back wages are paid in full or an action is commenced, up to a maximum of thirty days of wages.

61. Plaintiff and all KENDAL EMPLOYEE California Class members who ceased employment with KENDAL are entitled to unpaid compensation, but to date have not received such compensation.

62. More than thirty days have passed since Plaintiff and certain KENDAL EMPLOYEE California Class members left Defendant's employ.

63. As a consequence of Defendant's willful conduct in not paying compensation for all hours worked, Plaintiff and KENDAL EMPLOYEE California Class members whose employment ended during the class period are entitled to thirty days' wages under Labor Code § 203, together with interest thereon and attorneys' fees and costs.

///

///

///

///

///

FIFTH CLAIM FOR RELIEF

(California Meal and Rest Period Provisions, Cal. Wage Orders No. 4-2001 & No. 7-2001; Cal. Labor Code §§ 218.5, 226.7, & 512, Brought by Plaintiff on Behalf of Herself and the KENDAL EMPLOYEE California Class)

67. Plaintiff, on behalf of herself and all members of the KENDAL EMPLOYEE California Class, re-alleges and incorporates by reference paragraphs 1 through 66 as if they were set forth again herein.

68. Plaintiff and KENDAL EMPLOYEE California Class members regularly work and have worked in excess of five-hour shifts without being afforded at least a half-hour meal break in which they were relieved of all duty, as required by Labor Code §§ 226.7 and 512 and Wage Orders No. 4-2001 & No. 7-2001, § 11(a).

69. In addition, Plaintiff and KENDAL EMPLOYEE California Class members regularly work and have worked without being afforded at least one ten-minute rest break, in which they were relieved of all duty, per four hours of work performed or major fraction thereof, as required by Labor Code §§ 226.7 and Wage Orders No. 4-2001 & No. 7-2001, § 12

70. As a result of Defendant's failure to afford proper meal periods, it is liable to Plaintiff and the KENDAL EMPLOYEE California Class members for one hour of additional pay at the regular rate of compensation for each workday that the proper meal periods were not provided, pursuant to Labor Code § 226.7 and Wage Orders No. 4-2001 & No. 7-2001, § 11(b).

71. As a result of Defendant's failure to afford proper rest periods, it is liable to Plaintiff and the KENDAL EMPLOYEE California Class members for one hour of additional pay at the regular rate of compensation for each workday that the proper rest periods were not provided, pursuant to Labor Code § 226.7 and Wage Orders No. 4-2001 & No. 7-2001, § 12(b).

SIXTH CLAIM FOR RELIEF

(Reimbursement of Business Expenses and Unlawful Deductions from Wages Provisions, Cal. Wage Orders No. 4-2001 & No. 7-2001; Cal. Labor Code §§ 221, 223, 400-410, & 2802, Brought by Plaintiff on Behalf of Herself and the KENDAL EMPLOYEE California Class)

72. Plaintiff, on behalf of herself and all members of the KENDAL EMPLOYEE California Class, re-alleges and incorporates by reference paragraphs 1 through 71 as if they were set forth again herein.

73. Labor Code § 221 provides: “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.”

74. Labor Code § 223 provides: “Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.”

75. Labor Code §§ 400-410 (“Employee Bond Law”) provide the limited circumstances under which an employer can exact a cash bond from its employees. These provisions are designed to protect employees against the very real danger of an employer taking or misappropriating employee funds held by the employer in trust.

76. Labor Code §§ 2802 provides: “An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties”

77. These and related statutes, along with California's fundamental public policy protecting wages and wage scales, prohibit employers from subjecting employees to unanticipated or unpredicted reductions in their wages; making employees the insurers of their employer's business losses; otherwise passing the ordinary business losses of the employer onto the employee; or taking deductions from wages for business losses in any form unless the employer can establish that the

1 loss was caused by a dishonest or willful act, or gross negligence of the employee.

2 78. Defendant has violated Cal. Labor Code §§ 221, 223, 400-410, & 2802
 3 and IWC wage order Nos. 4 & 7, § 8 by unlawfully taking deductions from
 4 Plaintiff's and the KENDAL EMPLOYEE California Class' compensation to cover
 5 certain ordinary business expenses of Defendant, including but not limited to
 6 deductions for unsold flowers and "shrinkage", and by failing to reimburse and the
 7 KENDAL EMPLOYEE California Class for such expenditures.

8 79. Because Defendant made such unlawful deductions and/or failed to
 9 reimburse Plaintiff and the KENDAL EMPLOYEE California Class for such
 10 expenditures, Plaintiff and the KENDAL EMPLOYEE California Class has been
 11 injured and Defendant is liable for the compensation that should have been paid but
 12 for the unlawful deductions and/or amount of expenses that should have been
 13 reimbursed, pursuant to Cal. Labor Code §§ 221, 223, 400-410, & 2802 and IWC
 14 wage order Nos. 4 & 7, § 8.

15 80. By unlawfully deducting wages and failing to pay Plaintiff and the
 16 KENDAL EMPLOYEE California Class members, Defendant is also liable for
 17 reasonable attorneys' fees and costs under Labor Code § 218.5.

18 SEVENTH CLAIM FOR RELIEF

19 *(California Unfair Competition Law, Brought by Plaintiff on Behalf of Herself*
 20 *and the KENDAL EMPLOYEE California Class)*
 21

22
 23 81. Plaintiff, on behalf of herself and all members of the KENDAL
 24 EMPLOYEE California Class, re-alleges and incorporates by reference paragraphs 1
 25 through 80 as if they were set forth again herein.

26 82. The foregoing conduct, as alleged, violates the California Unfair
 27 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. Section 17200 of
 28 the Cal. Bus. & Prof. Code prohibits unfair competition by prohibiting, inter alia, any

1 unlawful or unfair business acts or practices.

2 83. Beginning at a date unknown to Plaintiff, but at least as long ago as four
3 years before the filing of this action, Defendant committed, and continues to commit,
4 acts of unfair competition, as defined by the UCL, by, among other things, engaging
5 in the acts and practices described herein. Defendant's conduct as herein alleged has
6 injured Plaintiff and the KENDAL EMPLOYEE California Class by wrongfully
7 denying them earned wages, and therefore was substantially injurious to Plaintiff and
8 to the KENDAL EMPLOYEE California Class.

9 84. Defendant engaged in unfair competition in violation of the UCL by
10 violating, inter alia, each of the following laws. Each of these violations constitutes
11 an independent and separate violation of the UCL:

12 a. The Fair Labor Standards Act, 29 U.S.C. § 201 et seq.;

13 b. California Labor Code § 1194;

14 c. California Labor Code §§ 201, 202, & 203;

15 d. California Labor Code §§ 218.5, 226.7, & 512;

16 e. California Labor Code §§ 221, 223, 400-410, & 2802

17 f. California Labor Code § 1174;

18 g. California Labor Code §§ 1182.11 & 1197; and

19 h. California Labor Code § 510, which provides in relevant part:

20 Any work in excess of eight hours in one workday and any work in excess of 40
21 hours in any one workweek and the first eight hours worked on the seventh day of
22 work in any one workweek shall be compensated at the rate of no less than one and
23 one-half times the regular rate of pay for an employee. Any work in excess of 12
24 hours in one day shall be compensated at the rate of no less than twice the regular
25 rate of pay for an employee. In addition, any work in excess of eight hours on any
26 seventh day of a workweek shall be compensated at the rate of no less than twice the
27 regular rate of pay of an employee.

28 85. Defendant's course of conduct, acts, and practices in violation of the

1 California laws mentioned in the above paragraph constitute a separate and
2 independent violation of the UCL. Defendant's conduct described herein violates the
3 policy or spirit of such laws or otherwise significantly threatens or harms
4 competition.

5 86. The unlawful and unfair business practices and acts of Defendant,
6 described above, have injured the KENDAL EMPLOYEE California Class members
7 in that they were wrongfully denied the payment of minimum wage, benefits and/or
8 overtime compensation.

9 87. Plaintiff, on behalf herself and the KENDAL EMPLOYEE California
10 Class members, seeks recovery of attorneys' fees and costs of this action to be paid by
11 KENDAL, as provided by the UCL and California Labor Code §§ 218, 218.5, and
12 1194.

13 88. Plaintiff, on behalf of herself and the KENDAL EMPLOYEE California
14 Class, seeks restitution in the amount of the respective unpaid wages earned and due
15 for all hours worked.

16
17 **EIGHTH CLAIM FOR RELIEF**

18 *(ERISA § 502(a)(3) Based on Failure to Maintain Records Brought by Plaintiff*
19 *on Behalf of Herself and the ERISA Class)*

20
21 89. Plaintiff, on behalf of herself and the ERISA Class, re-alleges and
22 incorporates by reference paragraphs 1 through 88 as if they were set forth again
23 herein.

24 90. ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1), requires that an employer
25 which sponsors an employee benefit plan maintain records with respect to each of its
26 employees sufficient to determine the benefits due or which may become due to such
27 employees.

28 91. On information and belief, the 401(k) Plan is an employee pension

1 benefit plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and an
2 employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3). On
3 information and belief, KENDAL provides its employees other benefits, including
4 but not limited to health coverage, vacation and sick pay ("Other ERISA Benefits
5 Plan"), which constitutes an employee welfare benefit plan within the meaning of
6 ERISA § 3(1), 29 U.S.C. § 1002(1), and an employee benefit plan within the
7 meaning of ERISA § 3(3), 29 U.S.C. § 1002(3).

8 92. On information and belief, pursuant to the terms of the 401(k) Plan,
9 employees' rights to share in the contributions to the Plan are dependent, in part, on
10 their Compensation, which includes, among other things, employees' wages. On
11 information and belief, pursuant to the terms of the Other ERISA Benefits Plan,
12 employees' rights to benefits including health coverage and vacation and sick pay are
13 dependent, in part, on their hours worked.

14 93. By its failure to record and/or report all of the hours worked by Plaintiff
15 and members of the prospective ERISA Class, Defendant has failed to maintain
16 records with respect to each of its employees sufficient to determine the benefit
17 accrual rights of 401(k) Plan participants and accrual rights under the Other ERISA
18 Benefits Plan, in violation of ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1).

19 94. In order to remedy this violation of ERISA by Defendant, Plaintiff on
20 behalf of herself and members of the ERISA Class seeks injunctive relief, benefits,
21 restitution, and such other equitable relief as the Court deems just and proper, as
22 provided by Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

23
24 95. Plaintiff on behalf of herself and members of the ERISA Class seeks
25 recovery of their attorneys' fees and costs of action to be paid by Defendant, as
26 provided by Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

27 ///

28 ///

NINTH CLAIM FOR RELIEF

(ERISA § 2 et seq. (29 U.S.C. § 1001 et seq.), Brought by Plaintiff on Behalf of Herself and the ERISA Class)

96. Plaintiff, on behalf of herself and the ERISA Class, re-alleges and incorporates by reference paragraphs 1 through 95 as if they were set forth again herein.

97. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that employee benefit plan fiduciaries discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries and, inter alia, (1) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administration; (2) with the care, skill, prudence, and diligence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims; and (3) in accordance with the documents and instruments governing the plan.

98. On information and belief, the governing instrument of the 401(k) Plan confers on Defendant discretionary authority, responsibility, and/or control with respect to the crediting of compensation, thereby rendering Defendant a fiduciary in that regard.

99. On further information and belief, Defendant has exercised actual discretionary authority, responsibility, and/or control in determining what compensation would and would not be credited under the 401(k) Plan. By reason of the exercise of such discretion, Defendant has been a fiduciary of that plan with respect to the crediting of compensation.

100. Defendant has breached its fiduciary duties by failing to include Plaintiff and the ERISA Class in the 401(k) Plan and by failing to credit compensation due for work performed by the Plaintiff and the members of the ERISA Class as

1 Compensation under the 401(k) Plan.

2 101. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the Plaintiff on
3 behalf of herself and all members of the ERISA Class seeks an injunction requiring
4 Defendant to include all members of the ERISA Class in the 401(k) Plan and to credit
5 them with Compensation under the 401(k) Plan for all of the past and future work
6 performed by those Class members and any such other equitable relief as this Court
7 deems appropriate.

8 102. Plaintiff on behalf of herself and members of the ERISA Class, seek
9 recovery of their attorneys' fees and costs of action to be paid by Defendant, as
10 provided by Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

11
12 **TENTH CLAIM FOR RELIEF**

13 ***(Plan Enforcement Under ERISA, § 502(a)(1)(B))***
14

15 103. Plaintiff, on behalf of herself and the ERISA Class, re-alleges and
16 incorporates by reference paragraphs 1 through 102 as if they were set forth again
17 herein.

18 104. Under the Employee Retirement Income Security Act of 1974
19 ("ERISA"), §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), Plaintiff is entitled to clarify
20 and enforce her rights and those of the ERISA Class Members pertaining to all
21 benefits owed under any plans for which they are eligible, include the 401K Plan and
22 the Other ERISA Benefits Plan.

23 105. Plaintiff has either attempted to exhaust administrative remedies but was
24 prevented by Defendant from exhausting such remedies, or exhaustion would be
25 futile wherein Defendant has adjudged Plaintiff and the ERISA Class Members to be
26 independent contractors rather than employees.

27 106. By wrongfully classifying Plaintiff and the ERISA Class Members as
28 ineligible under the 401K Plan and the Other ERISA Benefits Plan, Defendant has

1 violated, and continues to violate, the terms of the plans and the rights of Plaintiff and
2 the ERISA Class thereunder.

3 107. Plaintiff and the ERISA Class Members are properly classified as
4 employees and have the right to payment of benefits pursuant to the Defendant's
5 ERISA benefit plans. Accordingly, under 29 U.S.C. § 1132(a)(1)(B), Plaintiff and the
6 ERISA Class Members are entitled to declaratory relief as to pension, health,
7 disability, group insurance, dependent care, and/or other benefits that were not paid
8 as a result of their improper classification and an award of such benefits or the value
9 thereof.

10 ***PRAYER FOR RELIEF***

11
12 WHEREFORE, Plaintiff on behalf of herself and all members of the
13 Nationwide FLSA Class, prays for relief as follows:

14 A. Designation of this action as a collective action on behalf of the
15 KENDAL EMPLOYEE Nationwide FLSA Collective Plaintiffs (asserting FLSA
16 claims) and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly
17 situated members of the FLSA Opt-In Class, apprising them of the pendency of this
18 action, and permitting them to assert timely FLSA claims in this action by filing
19 individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b);

20 B. Designation of Plaintiff as Representative of the KENDAL
21 EMPLOYEE Nationwide FLSA Collective Plaintiffs;

22 C. A declaratory judgment that the practices complained of herein are
23 unlawful under the FLSA;

24 D. An award of damages, according to proof, including liquidated damages,
25 to be paid by Defendant;

26 E. Costs of action incurred herein, including expert fees;

27 F. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216;

28 G. Post-Judgment interest, as provided by law; and

1 H. Such other legal equitable relief as this Court deems necessary, just, and
2 proper.

3
4 WHEREFORE, Plaintiff on behalf of herself and all members of the California
5 Class, prays for relief as follows:

6 I. Certification of this action as a class action on behalf of the California
7 Class;

8 J. Designation of Plaintiff as the California Class Representative;

9 K. A declaratory judgment that the practices complained of herein are
10 unlawful under California law;

11 L. Appropriate equitable and injunctive relief to remedy Defendant's
12 violations of California law, including but not necessarily limited to an order
13 enjoining Defendant from continuing its unlawful practices;

14 M. Appropriate statutory penalties;

15 N. Damages and restitution, including waiting time penalties, meal and rest
16 break violation payments, record-keeping penalties, minimum wage, benefits and
17 overtime wages to be paid by Defendant according to proof;

18 O. Pre-Judgment and Post-Judgment interest, as provided by law;

19 P. Such other injunctive and equitable relief as the Court may deem just
20 and proper; and

21 Q. Attorneys' fees and costs of suit, including expert fees and fees.

22
23 WHEREFORE, Plaintiff on behalf of herself and all members of the ERISA
24 Class, pray for relief as follows:

25 R. Certification of this action as a class action on behalf of the proposed
26 ERISA Class;

27 S. Designation of Plaintiff as Representative of the ERISA Class;

28 T. A declaration that the practices complained of herein violate ERISA §

1 209(a), 29 U.S.C. § 1129(a) and that Plaintiff and the ERISA class members are full
2 participants in all ERISA plans otherwise available to Defendant's other employees;

3 U. Appropriate equitable and injunctive relief including retroactive benefits
4 and equitable restitution to remedy Defendant's violations of ERISA § 209(a);

5 V. A declaration that Defendant has breached its fiduciary duties by failing
6 to include Plaintiff and the ERISA Class in the 401(k) Plan and the Other ERISA
7 Benefits Plan and failing to credit the Plaintiff and the ERISA Class with
8 Compensation for all work performed, as required by ERISA and the terms of the
9 401(k) Plan;

10 W. An order requiring that Defendant remedy its breaches of fiduciary duty
11 by crediting Plaintiff and the ERISA Class with Compensation for all of their past,
12 present, and future uncompensated work;

13 X. Attorneys' fees and costs of suit; and

14 Y. Such other injunctive and equitable relief as the Court may deem
15 necessary, just, and proper.

16 Dated: November 11, 2008

THE GARCIA LAW FIRM
HOWARTH & SMITH

17
18 By: 

Don Howarth
Counsel for Plaintiff and Proposed
Counsel for the Putative Class

19
20
21 **DEMAND FOR JURY TRIAL**

22
23 Plaintiffs hereby demand a trial by jury.

24 Dated: November 11, 2008

THE GARCIA LAW FIRM
HOWARTH & SMITH

25
26
27 By: 

Don Howarth
Counsel for Plaintiff and Proposed
Counsel for the Putative Class

EXHIBIT

1

CONSENT TO JOIN AND SUE FORM

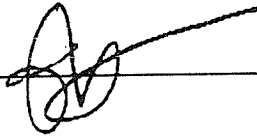
Consent to Sue under the Fair Labor Standards Act (FLSA)

I, Jennifer Burnham, was an employee of Kendal Floral Supply, LLC (Kendal) beginning in January, 2006.

I have read and approve the complaint in *Burnham v. Kendal Floral Supply, LLC* and consent to and choose to participate in the FLSA collective action, among other causes of action, set forth therein.

I choose to be represented in this matter by the named plaintiff and counsel (Howarth & Smith and The Garcia Law Firm) in this action.

Jennifer Burnham

A handwritten signature in black ink, appearing to be 'JB' with a long horizontal stroke extending to the right, positioned over a horizontal line.

10 Day of November, 2008

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Stephen V. Wilson and the assigned discovery Magistrate Judge is Carla Woehrle.

The case number on all documents filed with the Court should read as follows:

CV08- 7461 SVW (CWx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

===== :
NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

☒ **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

☐ **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

☐ **Eastern Division**
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

Stephen M. Garcia, SBN 123338
David M. Medby, SBN 227401
The Garcia Law Firm

Don Howarth, SBN 53783
Howarth & Smith

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Jennifer Burnham, individually and on behalf of a
class of others similarly situated

PLAINTIFF(S)

v.

Kendal Floral Supply, LLC

DEFENDANT(S).

CASE NUMBER

CV08-07461 SVW (CWx)

SUMMONS

TO: DEFENDANT(S): Kendal Floral Supply, LLC

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☒ complaint ☐ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, The Garcia Law Firm, whose address is One World Trade Center, #1950, Long Beach, CA 90831. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk U.S. District Court

Dated: NOV 12 2008

By: 

Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself <input type="checkbox"/>) Jennifer Burnham, individually and on behalf of a class of others similarly situated,	DEFENDANTS Kendal Floral Supply, LLC
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) The Garcia Law Firm, 1 World Trade Ctr, #1950, Long Beach, CA 90831 Howarth & Smith, 523 W. Sixth St., #728, Los Angeles, CA 90014	Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.) <input type="checkbox"/> 1 U.S. Government Plaintiff <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border: none;"> <tr> <td style="width:35%;">Citizen of This State</td> <td style="width:10%;">PTF <input type="checkbox"/> 1</td> <td style="width:10%;">DEF <input type="checkbox"/> 1</td> <td style="width:35%;">Incorporated or Principal Place of Business in this State</td> <td style="width:10%;">PTF <input type="checkbox"/> 4</td> <td style="width:10%;">DEF <input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	PTF <input type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF <input type="checkbox"/> 4	DEF <input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
Citizen of This State	PTF <input type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF <input type="checkbox"/> 4	DEF <input type="checkbox"/> 4														
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5														
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6														

IV. ORIGIN (Place an X in one box only.)
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify): ☐ 6 Multi-District Litigation ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: **JURY DEMAND:** ☒ Yes ☐ No (Check 'Yes' only if demanded in complaint.)
CLASS ACTION under F.R.C.P. 23: ☒ Yes ☐ No **MONEY DEMANDED IN COMPLAINT: \$** _____

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 Violations of FLSA (29 U.S.C. Section 201, et seq.) & Other COA's Based on Both Federal and State Law

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	TORTS PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus <input type="checkbox"/> 535 General Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition FORFEITURE / PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
---	--	--	---	---	--

FOR OFFICE USE ONLY: Case Number: CV 08-07461

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEETVIII(a). **IDENTICAL CASES:** Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes

If yes, list case number(s): _____

VIII(b). **RELATED CASES:** Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:(Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.**IX. VENUE:** (When completing the following information, use an additional sheet if necessary.)(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Fresno

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles	

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.**Note: In land condemnation cases, use the location of the tract of land involved.**

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER):

Date

11/12/08

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))